UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/850
25 November 1997

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 850

Case No. 957: PATEL

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay; Ms. Deborah Taylor Ashford;

Whereas at the request of Meena Patel, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended until 31 December 1996 the time-limit for the filing of an application with the Tribunal;

Whereas, on 18 December 1996, the Applicant filed an application requesting the Tribunal, inter alia:

"[To order the production of certain documents]; and

B. To order the rescission of the Secretary-General's decision dated 10 June 1996 separating the Applicant for misconduct under staff regulation 10.2, paragraph 1 and staff rule 110.3(a), with effect [from] 21 June 1996; and

C. To adjudge and declare that the Applicant has not been guilty of misconduct, but, at the most, of an error committed in good faith, at a time of severe stress due to compelling personal, professional and family circumstances; and

D. To order her retroactive reinstatement in the United Nations together with the restoration of her permanent appointment; or

E. Should the Secretary-General decide, in the interest of the UN, in accordance with article 9 of the Statute of the Tribunal, that the Applicant be compensated and not reinstated, to order payment to the Applicant of a

compensation equivalent to five years' net base salary at [the] D.1 grade, step IV for assignment in Bangkok, including restoration of pension and health insurance rights; ...

F. To order payment of $100,000 (one hundred thousand US dollars) as compensation for the material and professional injury sustained and its moral and financial consequences on the Applicant's professional career and personal life; ...

G. To order payment of three months' net base salary at [the] D.1 grade in Bangkok as compensation for the failure to afford the Applicant due process detailed below; and

H. To order reimbursement of all legal costs incurred in relation to the present complaint, and

I. To order payment of interest at 6% to [the] Applicant on all sums hereunder from 1 June 1996."

Whereas the Respondent filed his answer on 13 May 1997;

Whereas, on 4 June 1997, the Applicant filed written observations;

Whereas, on 21 October and 2 November 1997, the Applicant filed additional comments with the Tribunal;

Whereas, on 7 November 1997, the Tribunal requested the Respondent to provide it with additional information, which he did, on 11 November 1997;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Economic and Social Commission for Western Asia (ESCWA) on 7 July 1977, as a Transnational Corporations Affairs Officer, at the P-3, step I level, in Beirut, Lebanon, on a three month, fixed-term appointment, which was successively extended. On 1 April 1981, the Applicant was promoted to the P-4 level. On 1 July 1982, she was reassigned to ESCWA, Baghdad, Iraq. On 1 November 1982, she was given a probationary appointment. On 17 June 1983, she was transferred to the Economic and Social Commission for Asia and the Pacific (ESCAP) in Bangkok, Thailand, as an Economic Affairs Officer in ESCAP's

Development Planning Division. On 1 August 1983, the Applicant was given a permanent appointment. On 1 February 1988, she was given the functional title of Social Affairs Officer in ESCAP's Social Development Division. On 1 August 1988, the Applicant was promoted to the P-5 level. On 17 January 1994, she was appointed Officer-in-Charge of the Rural and Urban Development Division of ESCAP. On 1 November 1994, the Applicant was promoted to the D-1 level. On 21 June 1996, the Applicant was separated from service for misconduct.

On 30 September 1994, the Applicant submitted a Status Report and Request for Payment of Dependency Benefits form for the years 1992 and 1993, together with a "TO WHOM IT MAY CONCERN STATEMENT", dated 28 April 1994, from the Asian Institute of Technology (AIT), indicating that her husband had gross earnings of Baht 707,610 for the calendar year 1993.

On 11 November 1994, the Chief of the ESCAP Personnel Services Section acknowledged receipt of the form and advised the Applicant that her husband's earnings for 1993 exceeded the ceiling established for the payment of a dependency allowance. He explained that recovery of the amounts previously paid to the Applicant as a dependency allowance would start for the year 1993. He further asked the Applicant to supply information on her husband's earnings for 1992.

On 10 January 1995, the Chief, Personnel Services Section, wrote to the Applicant, reiterating the request for a statement of her husband's earnings for 1992. In a reply delivered to the Personnel Services Section on 12 January 1995, the Applicant submitted a statement from the AIT, dated 8 November 1994, in response to that request.

On 23 January 1995, the Chief of the ESCAP Personnel Section asked the Applicant to "clarify and confirm" the figures in that statement. In a response dated 27 January 1995, the Applicant sent a routing slip to the Chief, Personnel Services Section, stating, inter alia, "This is to confirm that the gross earnings of [the Applicant's husband] is Baht 601,576.00 from January to December

reflected in a memorandum dated 28 February 1992 from the Director of DIEC to the Executive Officer.

In a handwritten note dated 26 May 1992, to the Chief of Staff of the Under-Secretary-General of the Department of Economic and Social Development (DESD), the Director, DIEC, wrote that he had "been able to secure all records" pertaining to the Applicant. He added that: "As you can see[,] she has received an unfair deal first on the question of the private arrangement over ... her post and now in regard to her status. I should be most grateful if you could urgently assist [her] in resolving the situation". In another handwritten note of the same date to the Director of Personnel, the Director, DIEC, wrote: "I think [the Applicant's] case merits urgent and sympathetic consideration. She has received an unfair deal both in regard to her post in DIEC and now with regard to her status. I discussed this with ... the Chief of Staff of [the Under-Secretary-General of DESD], who promised to look into the matter. I have sent him the attached papers. I should be grateful if you could assist in redressing this anomalous situation".

Not having been included in the 1992 Senior Officer (P-5) Promotion Register, on 29 July 1993, the Applicant instituted a recourse procedure in accordance with information circular ST/IC/1993/35, requesting the APB to review her case for promotion from the P-4 to the P-5 level.

On 8 September 1993, the Applicant wrote to the Executive Officer, Department for Policy Coordination and Sustainable Development (DPCSD), transmitting her 29 July 1993 recourse letter and requesting "that [her] P-5 post be restored and action should be initiated to ensure that [she] be placed against post #UNA-1110-E-P-5-002".

On 29 October 1993, the Executive Officer, DPCSD, wrote to the Applicant, stating that she had been assigned to DPCSD with effect from 1 April 1993, against a P-4 level post and that "[t]he

points raised in [her] memorandum predate [her] DPCSD assignment and [were] not within [that] Department's purview".

On 4 November 1993, the Applicant wrote to the Secretary-General, requesting administrative review of the decision not to place her against a P-5 post in her department (DPCSD).

In a letter dated 17 November 1993, the Chairperson of the APB advised the Applicant that "notwithstanding the additional information presented in [her] communication, the Board's re-examination of [her] case did not reveal that there were sufficient grounds to amend its previous decision".

On 15 February 1994, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against "the administrative decision not the place [her] against a P-5 post in [her] department." The JAB adopted its report on 25 April 1995. Its considerations and recommendations read, in part, as follows:

> "Considerations
>
> A. Receivability
>
> ...
>
> 21. The Panel observed that the subject appeal involves two aspects, namely, (a) the Organization's failure to place the Appellant against a P-5 post and (b) the Organization's failure to include the Appellant in the 1992 P-5 Promotion Register.
>
> 22. With respect to the Appellant's claim regarding the Organization's failure to place her against a P-5 post, the Panel observed that the Appellant had been placed against a P-5 post in 1987, the same year that she had been promoted to the P-4 level. In July 1990, however, the Appellant had been removed from this post and placed against a P-4 post, a change which the Appellant acknowledged that she became aware of in 1991. The Panel further observed that the Appellant has since held only P-4 posts. Noting the above requirement that an appeal must be directed against an administrative decision, the Panel found that, other than the administrative decision to remove the Appellant from the P-5 post and place her against a P-4 post in 1990, against which an appeal would

17. Taken along with the certificate already submitted for 1993 earnings (...), the Committee was not convinced of the need for the staff member to have called anyone on receipt of the 1992 certificate. The error on the certificate regarding the contract expiry date was an egregious one, contradicted within the form itself, and not material to the determination of the dependency limits. Indeed, the certificate finally utilized to determine dependency status still contained the error.

18. The Committee took the view that the manner in which the certificate had been altered was significant. Although 'blatant' in a certain sense, an attempt had been made to make it look 'official', and the Committee gathered that if PSS [Personnel Services Section] had been less vigilant, it might have passed muster. The Committee agreed with the staff member's contention that, in retrospect, it would have been better to have obtained a new certificate altogether. It noted, however, that to have done so, if there was intention to defraud, would not have served the staff member's purpose.

19. The staff member and her counsel averred that the staff member's repeated confirmation of the lower incorrect figure proved that there had been no male fide intention. In fact, the Committee felt that PSS' two requests for clarification gave the staff member the opportunity to rethink the situation and rectify it - but she chose not to. The Committee realized that once the staff member's attention had been drawn to the falsified document, she was in a difficult position; she had either to maintain her position, which she did, or admit to having knowingly submitted a document with changes to what proved to be the correct figure.

20. All in all, the Committee felt that the onus of proof that the false certification was not done with intent to defraud, rested with the staff member. The Committee was not convinced, taking the above points into account, that the staff member had demonstrated a lack of male fide intention. In a certain sense, the staff member's actions were consistent with an intention to defraud: failure to submit the required information in the first instance, reported questioning of an apparently valid certificate, carefully changing the certificate in a manner that, had it passed unnoticed, would have brought her material gain, persisting in that contention when queried, and providing inconsistent evidence on the crucial matter of the identity of the AIT employee to whom she spoke.

21. The Committee therefore concluded that the charges brought against the staff member, namely,

a) false certification;
b) forgery;
c) attempted fraud; and
d) misrepresentation

were substantiated. The facts as established would constitute a violation of her obligations under staff regulation 1.4, which requires staff members to conduct themselves at all times in a manner befitting their status as international civil servants, and a violation of the standards of integrity expected of all international civil servants.

V. Recommendations

22 Having considered the case most carefully, and given the nature of the offence, the Committee would have recommended demotion as an appropriate disciplinary measure in the absence of any mitigating circumstances. However, based on information which had been provided in the staff member's submissions, the Committee recognized that there were mitigating circumstances in the present case. The Committee was deeply sympathetic to the staff member's situation although it was not able to determine the exact extent to which these circumstances, in particular their time frame in relation to the incidents under investigation, might have affected her judgement and actions (nor did it feel it appropriate to probe further into those circumstances). In view of the mitigating circumstances and the staff member's 18 years of satisfactory service, the Committee recommends that the Secretary-General take the following disciplinary measures against the staff member:

a) letter of censure to be placed in the staff member's official file;

b) loss of steps within grade - reversion to step I;

c) suspension without pay for three months.

The Committee also recommends that the staff member's certifying officer functions be withdrawn for a period of two years."

The Secretary-General has also taken note of the comments of the Board in paragraph 31 of its report and confirms that you will receive full and fair consideration, along with other applicants, for promotion to a vacant P-5 post for which you apply and are found to be qualified, and with due regard also to the applicability of the special measures to improve the status of women in the Secretariat set forth in administrative instruction ST/AI/382".

On 19 August 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was not given due consideration for a promotion to the P-5 level and, hence, the recommendation of the APB not to include her name in the 1992 Promotion Register cannot stand.

2. By not promoting her to the P-5 level, the Organization violated the promises made to the Applicant by senior managers on which she had relied to her detriment.

Whereas the Respondent's principal contentions are:

1. The Applicant's appeal against the administrative decision to remove her from a P-5 post and place her against a P-4 post is time-barred and, if not time-barred, did not violate her rights.

2. The Applicant failed to identify another administrative decision, besides that of July 1990, which may be a subject of her appeal.

3. The Applicant has no right to promotion but only to consideration for promotion. The Applicant was properly considered for promotion, and her rights were not violated by her non-inclusion in the Promotion Register.

4. The Administration did not make a binding commitment to promote the Applicant.

The Tribunal, having deliberated from 28 October to 25 November 1997, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Secretary-General to accept the recommendation of the Joint Appeals Board (JAB) that the Applicant was not wrongfully denied promotion to the P-5 level. The Applicant argues that, contrary to the views expressed by the JAB, the Administration had made a binding commitment to promote her to the P-5 level. Furthermore, she contends that her right to due consideration to fill P-5 post number UNA-11110-E-P-5-002 was violated when the post was filled by an external candidate. Consequently, the Applicant asks the Tribunal to order that she be fully and fairly considered for promotion to the P-5 level and that she be compensated for the personal injury and stress suffered as a result of the unfair treatment she received from the Administration.

II. At the outset, the Tribunal must deal with the issue of a time-bar of the Applicant's claim that her non-placement in a P-5 post violated her rights. The Tribunal notes that the Applicant had been placed in the P-5 post in 1987, the year she had been promoted to the P-4 level. In July 1990, the Applicant was removed from this post and placed in a P-4 level post. It appears that the Applicant became aware of this change of placement only in 1991. At that time, the Applicant could have availed herself of the recourse procedures established by staff rule 111.2. This rule allows an appeal from an administrative decision, "within two months from the date the staff member received notification of the decision in writing". The decision to remove the Applicant from a P-5 post and to place her in a P-4 post was taken at least one and a half years before the date of her appeal. The Tribunal therefore finds that

applicable in cases of misconduct" which the Administration had furnished to the JDC. The Respondent also admits that when the Chief, Personnel Services Section, provided additional clarification on the case, neither the Applicant nor her counsel were present and that two witnesses gave testimony in the presence of each other. The Tribunal notes that the charge of misconduct due to fraud against the Applicant is severe and therefore the Administration must be scrupulous in its respect for the requirements of due process. Having reviewed the case, the Tribunal takes note of the Respondent's admission that certain procedural errors were committed.

III. Paragraph 17 of administrative instruction ST/AI/371 dated 2 August 1991, states:

> "If the Committee [the JDC] decides to hear oral testimony, both parties and counsel should be invited to be present, and no witnesses should be present during the testimony of other witnesses."

The JDC did not respect this provision. The Tribunal finds that although the JDC committed procedural errors, these errors were technical in nature and did not affect the substance of the Applicant's case so as to result in a miscarriage of justice (Judgement No. 583, Djimbaye (1992)). Nonetheless, the Tribunal wishes to emphasize that especially in a difficult case such as this one, the Administration must take care to ensure that all procedural requirements are scrupulously respected.

IV. On the substance of her claim, the Applicant submits that the Administration's charges against her had not been proven beyond a doubt and that they should therefore be dismissed. The Tribunal rejects this argument. Under the Staff Regulations and Rules, disciplinary proceedings are administrative proceedings regulated by

the internal law of the Organization. Once a prima facie case of misconduct is established, the staff member must provide satisfactory evidence to justify the conduct in question (Judgements No. 484, Omosola (1990) and No. 592, Dey (1991)).

V. The Tribunal notes that it is incumbent upon the staff member who obtains allowances or benefits from the Administration, on the basis of his or her certification, to ensure that proper information is supplied. The Applicant submitted a certificate for dependency benefits on which she indicated that "I certify that the information provided in this form, as well as the supporting evidence submitted with it, is true and complete to the best of my knowledge and belief." Since the certification was incorrect, the Applicant had the onus of proof to convince the Secretary-General that, in submitting the certificate, she had not acted contrary to the highest standards of integrity, as mandated by the United Nations Charter. In order for the Applicant to prevail, it is not sufficient for her to claim good faith based on trusting another's representation (Cf. Judgement No. 424, Ying (1988)). The Applicant has produced evidence showing that her conduct was, or may have been, attributed to the dire personal circumstances in which she found herself at the time of her misconduct. The JDC's consideration of these facts led it to find that they constituted mitigating circumstances. Consequently, the JDC recommended that the Applicant be suspended without pay for three months, that she lose all steps within her grade above step I, and that a letter of censure be placed in her personnel file.

VI. It is within the Secretary-General's discretion, however, to determine whether a staff member has met the standards of conduct required by the Charter and the Staff Regulations and Rules. (Cf. Judgements No. 424, Ying (1988); No. 425, Bruzual (1988 and No. 479, Caine (1990)). It is clear that the Secretary-General, in

his determination, must act without prejudice or other extraneous considerations and with respect for the requirements of due process (Cf. Judgements No. 436, Wiedl (1988) and No. 641, Farid (1994)). Taking into account the technical procedural errors previously discussed, the Tribunal considers that, however harsh the result may be for the Applicant, the Secretary-General was within his discretionary authority in determining that the Applicant's alteration of the AIT certificate constituted misconduct, which should result in the sanction applied.

VII. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Member

Deborah Taylor ASHFORD
Member

New York, 26 November 1997

R. Maria VICIEN-MILBURN
Executive Secretary